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Calendar No. 695

101ST CONGRESS *2d Session*	SENATE	REPORT 101-374

TRANSIT EMPLOYEE TESTING ACT OF 1990

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2434

JULY 17 (legislative day, JULY 10), 1990.—Ordered to be printed

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2434]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2434) to permit the implementation of the Department of Transportation anti-drug program rule for recipients of Federal mass transit assistance, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill as amended do pass.

PURPOSE OF BILL

The bill, as reported, would require the Secretary of Transportation (the "Secretary"), in the interest of safety, to issue rules within twelve months of enactment to establish drug and alcohol testing programs for individuals employed in safety-sensitive positions in the mass transportation industry. The bill would treat safety-sensitive employees in mass transportation operations in the same manner as safety-sensitive employees are treated in the aviation, rail, and motor carrier industries, under S. 561, the Transportation Employee Testing Act, legislation previously approved during this Congress by the Committee and the full Senate.

The bill would provide for five types of testing, including random, pre-employment, post-accident, periodic recurring, and reasonable suspicion testing. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by the Department of Health and Human Services (HHS) and the De-

partment of Transportation (DOT), require that any laboratory involved in testing for drugs must have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods. It also would require the Secretary to mandate the development of rehabilitation programs for certain employees who are found to have used illegal drugs or alcohol.

The bill would provide statutory authority for the testing rules issued in 1988 by the Urban Mass Transportation Administration (UMTA), within DOT, for the mass transportation industry. It also would require DOT to supplement these rules with requirements for alcohol testing.

BACKGROUND AND NEEDS

Substance abuse in transportation and the need for testing

Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism.

In the transportation sector, the costs of drug and alcohol use are clearly magnified. Whenever individuals board an airplane, train, motor carrier, or transit vehicle, they put their lives into the hands of those who are being paid to ensure safe travel. This trust relies upon the vigilance of trained personnel to remain alert to any possible occurrence that might endanger the safety of the public they serve. The potential for catastrophic disaster created by those who abuse alcohol and illicit drugs while working in safety-sensitive transportation areas mandates that every effort be made to eliminate the cause of the threat.

At no time was this made more evident than after the January 1987 crash in Chase, MD, between an Amtrak passenger train and a Conrail freight train. This accident resulted in 16 fatalities and 170 injuries. The Conrail train's engineer and brakeman subsequently testified that they had been smoking marijuana in the cab of the Conrail locomotive prior to the fatal accident. The National Transportation Safety Board further found that a probable cause of the accident was the engineer's failure, as a result of impairment from marijuana, to stop the train in compliance with cab and wayside signals. In addition, testing indicated the brakeman had traces of the hallucinogenic drug PCP in his urine. Given the results of recent research which shows that certain drugs can impair an individual's performance up to 24 hours after consumption, substance abuse remains a serious matter of concern. Other examples have been presented regarding the problem insofar as the aviation and motor carrier industries are concerned.

Use of drugs and alcohol similarly has been a factor in mass transit accidents. In Philadelphia alone, transit workers tested positive for drugs or alcohol use in six major accidents between 1986 and this year. These accidents resulted in 183 injuries and 3 deaths.

In 1985, two Miami, FL transit trains collided, injuring 16 persons and causing $1.6 million in property damage. In addition, a Metro-North train operator tested positive for marijuana following a crash in 1987 which injured 30 people.

In 1988, a Metro-North commuter train crashed into another train in New York, killing the engineer and injuring two other workers. The deceased engineer and four other employees involved in the accident tested positive for various drugs. This year in Cleveland, OH, a supervisor and a driver/trainee tested positive for illegal drug use after they smashed a transit vehicle into construction equipment. These are only a few examples of the problem posed by drugs and alcohol in mass transportation.

This legislation is intended to deter the use of alcohol and drugs by those in safety-sensitive positions through testing. The bill achieves this objective by requiring the testing of such employees in five situations. These situations include prior to employment, after an accident, upon reasonable suspicion, and on a random basis. In addition, the bill authorizes testing during recurring situations such as physical examinations.

The Committee believes that testing is necessary to deter the use of illegal drugs and alcohol by employees in safety-sensitive positions. There are several instances where testing programs have acted as successful deterrents to the use of illegal drugs and abuse of alcohol. Within DOT, the Coast Guard, which randomly tests its uniformed personnel, has found that the number of individuals testing positive has declined from 10.3 percent in fiscal year (FY) 1983, when the testing began, to less than 1 percent in FY 1989. After the Department of Defense instituted a random testing program, drug use in the military was reduced by 82 percent and the percent of positive test results dropped from a 27 percent usage rate in 1980 to 4.8 percent in 1988, the most recent full year for which information is available.

Large numbers of transportation employees in safety-sensitive positions work in an environment with little, if any, direct supervision. Therefore, a strong deterrent, such as the threat of being detected and sanctioned for drug and alcohol use, is particularly needed. While several types of testing are needed to address specific situations, the key to deterrence is random testing. Under random testing, transportation employees in safety-sensitive positions will have no advance warning of when they might be tested. With an increased likelihood of detection, they will think twice about using illegal drugs or drinking on the job. It is the resultant elimination of drug and alcohol usage by such employees that this legislation is intended to accomplish.

Accuracy of testing

In any drug and alcohol testing program, accuracy is essential. This is necessary both to ensure that individuals do not escape de-

tection and, most importantly, to ensure against erroneous positive test results.

Given the Committee's commitment to accuracy in testing and to the protection of employees, it is important to address the issue of so-called "false positives." Opponents of drug testing often will cite the number of "false positives," particularly in initial screenings, as evidence against the accuracy of testing. It is true that in initial screenings the presence of drugs and alcohol can be indicated and that in subsequent confirmation tests a "negative" can be shown, leading to the conclusion that the first test constituted a "false positive." This inconsistency would be cause for significant concern if a second test were not required by the bill to confirm any initial screening which suggested a positive reading, and if any conclusion were attached to the results of the initial screening. The Committee, however, has taken great care to protect employees both by requiring that a second test of high laboratory quality be administered to confirm any initial screening which indicates the use, in violation of law or Federal regulations, of alcohol or a controlled substance, and by requiring confidential treatment of the initial screening. No conclusion can be reached from the initial screening, and any specimen testing negative on confirmation shall be reported as negative, without disclosure of the results of the screening test. By incorporating laboratory certification and testing procedures developed by HHS and DOT and by providing for the subdivision of specimens and the opportunity for an independent test of positive samples, the Committee has further taken affirmative steps to ensure accuracy.

Estimates as to the level of accuracy in the initial screenings vary, although the Congressional Research Service, in a report entitled "Constitutional Analysis of Proposals to Establish a Mandatory Public Employee Drug Testing Program" dated April 12, 1988, has stated that initial drug screening tests can be between 95 and 99 percent effective. At present, Gas Chromatography/Mass Spectrometry (GC/MS) is the method most widely used for confirmation testing. GC/MS is considered by technical experts and the Federal courts to be virtually 100 percent accurate when performed properly by knowledgeable lab personnel. This legislation requires that either GC/MS or another equally accurate test be used to confirm any initial screening which indicates the use, in violation of law or Federal regulation, of alcohol or a controlled substance.

The safeguards included in the bill are intended to bring about accuracy by protecting the integrity of samples, providing for a proper chain of custody, and ensuring that laboratories are properly equipped and meet Federal accreditation and proficiency standards necessary to provide for accurate test results.

The constitutionality of drug and alcohol testing

In Senate Report 101–172, accompanying S. 561, the Transportation Employee Testing Act, the Committee reviewed the applicable case law associated with government-mandated testing. In doing so, the Committee concluded that while the Constitution protects individuals from unreasonable searches and seizures, a paramount interest exists in ensuring that transportation personnel entrusted with safety-sensitive responsibilities remain free from the effects of

the unlawful use of drugs and alcohol abuse. The public trust in the country's transportation system must not be compromised. With regulations required by the bill, as reported, to protect an individual's due process rights, any intrusion deemed to occur from the proposed testing methods is reasonable in view of the governmental goals to be furthered by the legislation.

The same constitutional analysis applied by the Committee to S. 561, which requires drug and alcohol testing, including random testing, of safety-sensitive employees in the rail, aviation, and motor carrier industries, is applicable to the bill at hand, which requires drug and alcohol testing of safety-sensitive employees in mass transportation. Of particular import is the Supreme Court's analysis in *Skinner* v. *Railway Labor Executives' Association,* 489 U.S. , 109 S. Ct. 1402 (1989), finding a compelling government interest in the post-accident testing of railroad employees, even in the absence of a particularized suspicion. In *Skinner,* the Court described this interest as preventing improper "discharge of duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner* at 1419. The Court noted further that "a substance-impaired employee in a safety sensitive job can cause great human loss before any signs of impairment become noticeable." Supra.

A related risk is posed by mass transportation employees who illegally use drugs or abuse alcohol, leading to the conclusion that a carefully crafted measure, with the protections intended by the Committee to ensure that an individual's due process rights are respected, would be consistent with the Court's analysis in *Skinner.* Key to this conclusion are assurances that employees are: (1) informed that a random drug testing program will be established; (2) provided an opportunity to be heard prior to completion of the rulemaking; (3) not subjected to direct surveillance while producing a specimen for the test; (4) chosen for random tests by a nondiscriminatory and impartial method; and (5) given a second high-quality confirmatory test for all positive screening tests, all consistent with the Committee's intent.

Finally, the Committee affirms existing mechanisms in law or agreement through which employees may have an opportunity to challenge testing procedures or proposed disciplinary actions resulting from testing. The Committee expects that the Secretary will address the question of hearing opportunities for affected individuals.

In conclusion, it also should be noted that the Supreme Court recently denied the issuance of a writ of certiorari to review a decision by the U.S. Court of Appeals for the District of Columbia Circuit, upholding DOT's mandatory suspicionless testing program (including random testing) for the Department's own safety-sensitive personnel. *American Federation of Government Employees* v. *Skinner,* 885 F.2d 884 (D.C. Cir. 1989), cert. denied No. 89-1272, 109 L. Ed. 2d 321 (1990). While this cannot be viewed as dispositive of the constitutional issue at hand, the Committee notes that this denial does nothing to call into question the Committee's views with regard to the validity of a properly structured testing program.

LEGISLATIVE HISTORY

On April 5, 1990, Senator Dole on behalf of Senator D'Amato, introduced S. 2434, a bill to permit the implementation of the DOT anti-drug program rule for recipients of Federal mass transit assistance. The bill is cosponsored by Senators DeConcini, Wilson, McConnell, Coats, Thurmond, Danforth, and Hollings.

As introduced, S. 2434 simply would have provided statutory authority for the Secretary to issue DOT's final rule entitled "Control of Drug Use in Mass Transportation Operations," originally issued on November 21, 1988. This rule was overturned by the U.S. Court of Appeals for the District of Columbia on the basis that UMTA's enabling statute did not provide the authority for UMTA to issue "uniform national criteria" for local transit authorities. As reported, S. 2434 would provide a statutory mandate for DOT to issue drug and alcohol testing rules.

The reported version of S. 2434 is similar substantively to S. 561, except that S. 2434 addresses mass transportation operations, whereas S. 561 covers safety-sensitive workers in the rail, aviation, and motor carrier industries. During the last two Congresses, the Senate has gone on record nine times in support of drug and alcohol testing legislation in conformity with the provisions of S. 561—twice during the 100th Congress and on seven occasions during the 101st Congress. None of these provisions has been enacted into law. One of the measures approved, the Senate's omnibus drug bill considered at the end of the 100th Congress, included testing for safety-sensitive mass transportation workers, among others. The Senate's drug and alcohol testing provisions for mass transit and other transportation workers were subsequently deleted from the final drug measure, H.R. 5210, based on differences with the House of Representatives over mandatory rehabilitation for workers who test positive, and over whether there should be testing outside of the rail industry.

The Committee has held a number of hearings during the 99th, 100th, and 101st Congresses on the need for legislation to combat drug and alcohol abuse in the transportation industries. The most recent of these hearings, chaired by Senator Hollings, on June 15, 1989, was on S. 561 and included testimony by the Secretary, as well as representatives of the aviation, rail, motor carrier, maritime, and pipeline industries, and of labor and public interest groups.

On May 22, 1990, the Committee met in open executive session to consider an amendment in the nature of a substitute offered by Senator Hollings to the original text of S. 2434. Without objection, the Committee ordered the amended bill to be reported favorably.

SUMMARY OF MAJOR PROVISIONS

The bill would require the Secretary to issue rules within 12 months of enactment for testing and rehabilitation programs for mass transportation employees responsible for safety-sensitive functions. These rules would include the following.

1. The Secretary would be required to prescribe regulations to require mass transportation operations to conduct pre-employment, reasonable suspicion, random, and post-accident testing. Post-acci-

dent testing would be required where there is a fatality or other serious accident involving bodily injury or significant property damage. The Secretary also would be authorized to require periodic recurring testing, for example, in conjunction with required physical examinations. Employees covered include those responsible for safety-sensitive functions, as determined by the Secretary. Mass transportation operations covered include recipients of Federal financial assistance under section 3, 9, or 18 of the Urban Mass Transportation Act of 1964 (49 App. U.S.C. 1602, 1607(a), or 1614) or section 103(e)(4) of title 23, U.S. Code.

2. The Secretary shall consider disqualification or dismissal of any employee determined to have used or been impaired by alcohol while on duty and to have used a controlled substance, whether on duty or not, except for medical purposes.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. Mass transportation operations are not precluded from establishing rehabilitation programs in cooperation with other operations.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, confirm all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods. In addition, any laboratory involved in testing for drugs must have the capability of performing screening and confirmation tests at such laboratory.

5. Inconsistent State laws would be preempted and any existing DOT regulations would continue in force until implementation of the requirements of this legislation.

6. A person would not be eligible for Federal mass transportation financial assistance if such person was required to establish a program of alcohol and controlled substances testing, and failed to establish a program in accordance with such regulations.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 4, 1990.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2434, the Transit Employee Testing Act of 1990, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, May 22, 1990. CBO expects that enactment of

this bill would result in costs to the federal government of about $200,000 in fiscal year 1990 and costs to state and local governments of at least $13 million to $20 million per year.

S. 2434 would direct the Secretary of Transportation to issue regulations within one year after enactment requiring recipients of federal mass transit assistance to implement drug and alcohol testing programs. These regulations would have to require preemployment, reasonable suspicion, random and post-accident testing of employees responsible for safety-sensitive functions, as well as rehabilitation programs for these employees. The bill also establishes procedures for testing.

Federal costs

The Urban Mass Transportation Administration (UMTA) issued regulations on November 21, 1988, mandating drug testing for transit employees that were similar to regulations required by this bill, but not requiring testing for alcohol. Those regulations have been suspended, however, following a ruling by the U.S. Court of Appeals that UMTA lacks statutory authority to impose such rules. This bill would provide that authority and would require testing for alcohol. CBO estimates that this new rule-making activity would cost the agency about $200,000, mostly in fiscal year 1991.

In addition, the federal government might bear some part of the costs of these testing programs, which are discussed below. The operating costs of most mass transit systems are subsidized by the federal government through grants by UMTA. We cannot predict the extent to which these grants might be increased to compensate for additional costs attributable to S. 2434.

State and local costs

The regulations required by S. 2434 would apply to approximately 200,000 transit employees. We estimate that the cost for all the affected governments of testing these employees for drugs and alcohol would be between $8 million and $15 million per year, once programs are fully implemented. This estimate is based on information provided by the Department of Transportation and on the actual cost of testing in other industries. The exact amount would depend largely on the type of alcohol test used. This estimate assumes that random tests would be conducted at an annual rate of 50 percent of covered employees, which is the level required by the suspended UMTA regulations. In addition, we estimate that costs associated with training, reporting and quality control would be about $5 million per year. State and local governments might also incur costs for litigation relating to collective bargaining and constitutional issues, and could bear some costs for rehabilitation programs.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marjorie Miller, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

Number of Persons Covered

This legislation covers mass transportation operations. The Committee estimates that approximately 195,000 to 200,000 transit employees will be covered by this legislation.

Economic Impact

The major areas of economic impact upon UMTA and mass transportation operations include testing costs, rehabilitation program costs, and employee assistance program costs. These costs will vary according to the number of affected employees, the frequency in which they are tested, and the number of employees in need of rehabilitation. Total costs are difficult to estimate, because the bill does not establish a minimum number of times any individual or class of employees must be tested, or require rehabilitation for employees who test positive.

Preliminary figures have placed the cost of initial screening and confirmatory tests, as well as the related administrative costs, at between $23–$100 per employee, depending on the type of test used, the number of drugs tested, and the sensitivity of the test. In addition, testing costs often can be reduced through the joint purchasing power of trade associations or other organizations. Similarly, as testing becomes more widespread, it is possible that the cost of testing will be lowered by the new volumes of testing required.

Rehabilitation program costs vary considerably based upon the type, location, and length of the program. Employee assistance program costs associated with the education, counseling, and training of employees after rehabilitation are estimated to be $20–$30 per employee.

Privacy

Testing of transportation employees in safety-sensitive positions will necessarily involve some intrusion into the privacy of these individuals, which the Committee believes is justified, given the overwhelming public interest in safe transportation, and which is constitutionally given the scope of the problem, the safeguards in the legislation, and the diminished expectation of privacy of safety-sensitive employees. (See Senate Report 101–172 for its analysis of the constitutionality of testing safety-sensitive employees.)

Paperwork

With respect to paperwork requirements, the Committee recognizes that compliance with the regulations to be promulgated pursuant to this legislation potentially could be significant, assuming that mass transportation operations will be required to certify to the Secretary that their testing and rehabilitation programs are operative and being properly administered, and that there is adherence to the testing safeguards. This legislation is not expected to impose substantial reporting requirements beyond those that were

anticipated under DOT's testing regulations. The Committee expects, whether through statutory or administrative requirements for testing, that the Secretary will seek to minimize additional paperwork requirements wherever possible, through "piggyback" reporting, random auditing, or other appropriate methods.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

This section states that the short title of the bill is the "Transit Employee Testing Act of 1990".

Section 2.—Findings

This section contains the statement of Congressional findings emphasizing the need to eliminate drug use and alcohol abuse throughout the country and, in particular, among those who are responsible for the safe movement of buses and trains used in mass transportation operations. In this regard, increased testing, including the use of random testing, has been found successful in deterring the continued abuse of alcohol and illegal drugs. Congress also finds that safeguards can be implemented to protect individual privacy, reduce the potential for harassment, and ensure against undue harm to a person's reputation or career. Finally, there is a recognition that rehabilitation is an important part of any testing program and should be made available, as appropriate.

Section 3.—Definitions

This section defines terms in the legislation.

1. The term "controlled substances" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) whose use the Secretary has determined poses a risk to transportation safety. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse are included in the testing programs established under this section.

2. The term "person" includes any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of the United States, or any State, territory, district, or possession thereof, or the laws of any foreign country.

3. The term "Secretary" means the Secretary of Transportation.

4. The term "mass transportation" means all forms of mass transportation except those forms that the Secretary determines are covered adequately, for purposes of employee drug and alcohol testing, by either the Federal Railroad Safety Act of 1970 (45 U.S.C. 431 et seq.) or the Commercial Motor Vehicle Safety Act of 1986 (49 App. U.S.C. 2701 et seq.).

Section 4.—Regulations by Secretary of Transportation

Section 4 of the bill establishes requirements for drug and alcohol testing. Subsection (a) provides that, within 12 months after the date of enactment, the Secretary shall establish a program which

requires mass transportation operations to conduct pre-employment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions (as determined by the Secretary) for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Secretary is authorized to prescribe regulations, as appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for the use of alcohol or a controlled substance.

This section specifies the conditions under which safety-sensitive employees must be tested. Pre-employment testing is self-evident. Testing also will be required when there is reasonable suspicion to believe that an individual is currently under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion as envisioned by this bill does not require a showing of probable cause as that term is typically defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing would require specific, personal observations by one or more supervisory personnel concerning the appearance or conduct of a safety-sensitive employee.

With respect to random testing, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to leave it to the Secretary to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. While it is important that each program provide adequate coverage to ensure effective deterrence of drug and alcohol abuse, it is also important to ensure that programs are carefully tailored to eliminate the expense of unnecessary testing and minimize the financial impact on mass transportation operations and the burden on employees.

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with UMTA drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver from such requirements for such operations would not be contrary to the public interest and would not diminish the safe operations of rural transit conveyances, the Committee would not object to the waiver, in whole or in part, of application of regulations issued pursuant to this bill with regard to recipients of funds under section 18 of the Urban Mass Transportation Act of 1964.

Finally, as is noted in section 6(8), on testing safeguards, it is critical that whatever means is chosen to select randomly employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The bill, as reported, authorizes, but does not require, the Secretary to mandate testing on a periodic recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the mass transportation industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing

the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic recurring basis.

Subsection (b) provides that post-accident testing of a safety-sensitive employee shall be required in the case of any accident in which loss of human life occurs, or, as determined by the Secretary, any other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a mass transportation operation. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or property damage for which testing for drugs and alcohol would be warranted.

Section 5.—Program for rehabilitation

Section 5 requires the Secretary to promulgate regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment of mass transportation employees who are determined to have used alcohol or a controlled substance in violation of law or Federal regulation. The Secretary is directed to determine the circumstances under which such employees shall be required to participate in such a program. Nothing in this section shall preclude a mass transportation operation from establishing a rehabilitation program in cooperation with any other such operation.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

Section 6.—Procedures for testing

Section 6 requires the Secretary, in establishing a testing program under section 4, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which (A) establish comprehensive standards for all aspects of laboratory controlled substances testing and procedures to be applied in carrying out the Act, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review

of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out the Act;

3. require that any laboratory involved in the controlled substances testing of any individual under the Act shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

5. provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests such an independent test within 3 days after being advised of the results of the confirmation test;

6. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under the bill as reported; and

8. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure vigorous adherence to them.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, the Committee intends that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as provided

by this bill and as DOT has done in 49 CFR part 40 as it currently exists, is an essential component of the procedural safeguards specified in this section. Realizing that these guidelines are possibly subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect are mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends for testing for alcohol to be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current blood alcohol concentration of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute given the impact testing can have on an individual's career and life.

Among the employee safeguards included in this section is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the bill, as reported, directs that a portion of each sample be retained as a control in case any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with the opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and non-alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random se-

lection process might provide one method for minimizing the potential for harassment.

Section 7.—Effect on other laws and regulations

Section 7 establishes provisions for limiting the effect of legislation enacted by State and local governments on regulations issued by the Secretary under the authority of the Act. This section also requires the Secretary to consider the international obligations of the United States and the applicable laws and regulations of foreign countries when issuing regulations.

Section 7(a) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under the bill, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of the Act, and therefore the Committee is acting to preempt those restrictions. At the same time, the Committee is concerned that existing programs to curb drug and alcohol abuse, which have been developed through collective bargaining between State and local agencies and their employees, and which have survived legal challenge, not be disrupted by their lack of strict "consistency" with UMTA regulations. It is not the Committee's intention to disrupt aggressive drug testing programs which have survived the collective bargaining and legal process.

Section 7(b) provides that nothing in the Act shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations issued before the date of enactment that govern the use of alcohol or controlled substances by mass transportation employees.

Section 7(c) provides that, in issuing regulations under the Act, the Secretary only shall establish requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations of foreign countries.

Section 8.—Determination of sanctions

Section 8 establishes provisions for disqualification for mass transportation employees determined to have used drugs or alcohol in violation of Federal regulations.

Subsection (a) provides that, as the Secretary considers appropriate, the Secretary shall require (1) disqualification for an established period of time or dismissal of any employee who is determined to have used or to have been impaired by alcohol while on duty; and (2) disqualification for an established period of time or the dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law or any regulations.

Subsection (b) provides that nothing in the bill shall be construed to supersede any penalty applicable to a mass transportation employee under any other provision of law.

Section 9.—Eligibility for financial assistance

Section 9 provides that a person shall not be eligible for Federal financial assistance under section 3, 9, or 18 of the Urban Mass Transportation Act of 1964 or section 103(e)(4) of title 23, U.S. Code, if such person: (1) is required, under regulations prescribed by the Secretary, to establish a program of alcohol and controlled substances testing; and (2) fails to establish such a program in accordance with such regulations.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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